IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Parentage and Support of C.R.W., Minor child. SCOTT RUSSELL WALKER, Petitioner/Alleged Father, and MARIA CHRISTINA RUACHO, Respondent/Mother. In the Matter of the Custody of C.R.W., Minor child. CHRISTOPHER RUACHO and CARLY RUACHO, Respondents, v. SCOTT RUSSELL WALKER, Appellant.	)	No. 62308-7-I DIVISION ONE UNPUBLISHED OPINION FILED: August 24, 2009

Grosse, J. — Where an individual is not the presumed father of a child because he was not married to the mother but did live with her, he has no legal basis to oppose genetic testing to determine parentage, particularly where he alleges he is the father but the mother has denied that paternity. Nor does the

record before us provide a factual basis to support a claim of de facto parentage. Accordingly, the trial court was correct in placing the child with the guardians designated by the deceased mother in her last will and testament.

FACTS

In June 2002, Maria (Tina) Ruacho became pregnant while living with Scott Walker.[1] A few months later, for reasons that are disputed, Walker asked Tina and her two older children to move out of the house. Tina did not move back in during the pregnancy.

CRW was born on March 21, 2003. The parties dispute what Tina represented at the time concerning the identity of CRW's biological father. Walker claims that Tina said he was the father whereas Tina's siblings assert that Tina had told them that Walker was not the father. Tina's adult children also contend that Walker did not believe he was the father. Additionally, Tina submitted a declaration that Walker was not the father.

Tina and Walker continued to have a relationship, but they lived apart most of the time. The amount of time they lived together is disputed. Tyler, Tina's adult son, maintains that there was only a 6-week period that he lived with them. However, Walker did fill a paternal role and CRW viewed him as his father.

In June 2007, Tina developed pneumonia and was hospitalized. On June 28, 2007, Walker took CRW to live with him after learning that Tina's brother,

[1] Tina had previously been married to Walker's brother, Joe, who died from AIDS (acquired immune deficiency syndrome).

Christopher, planned to adopt CRW. A few days later, Walker filed a petition for residential schedule asking the court to place CRW with him. Walker also filed a paternity affidavit signed by Tina in October 2006 that stated he was CRW's father.

Tina opposed Walker's petition. In her declaration, she stated that Walker was not CRW's biological father, that she knew she was dying, and that she wished CRW be placed with her brother and sister-in-law, Christopher and Carly Ruacho. On July 23, 2007, the court ordered CRW placed with Walker.

Tina died two weeks later. She appointed the Ruachos as guardians of CRW in a will dated July 30, 2007. The Ruachos filed a nonparental custody petition which was consolidated with Walker's residential schedule case. CRW's two older adult siblings, both of whom lived with their mother and CRW during her relationship with Walker, supported their aunt and uncle in the legal proceedings. CRW's court appointed guardian ad litem (GAL) recommended that CRW's best interests would be served by ordering genetic testing to determine whether Walker was the biological father.

In February 2008, the court converted Walker's case into an adjudication of paternity and ordered DNA (deoxyribonucleic acid) testing. That testing established that Walker was not CRW's biological father. Walker then filed an amended petition asking that he be adjudicated CRW's de facto parent.

On June 4, 2008, the court dismissed Walker's petition and awarded immediate and permanent custody to the Ruachos. The court allowed Walker

temporary supervised visitation to ease the transition. Though the order expressly stated that it is a final judgment, Walker did not immediately appeal. Two months later, on August 14, 2008, the court entered its findings of fact and conclusions of law. On August 29, 2008, Walker filed a notice of appeal. A few days later, he filed a motion for a stay and for accelerated review. A commissioner of this court denied the motion for stay, but granted accelerated review. A motion to modify the commissioner's ruling was denied.

Walker appealed the commissioner's ruling to the Supreme Court and subsequently converted the appeal to a request for discretionary review. A commissioner of that court denied the motion for a stay, declined discretionary review, and remanded back to this court.

Walker appeals the trial court's order finding he is not the father of CRW and transferring custody of CRW to his uncle and aunt, the Ruachos, who were the guardians designated by Tina. Walker contends the trial court erred in requiring genetic testing and not finding him to be the acknowledged father. In the alternative, Walker contends the court erred in not finding him to be the de facto parent.[2]

ANALYSIS

Acknowledgment

Walker initially obtained temporary custody of CRW by claiming he was the father and that he had already acknowledged paternity. Tina did sign an acknowledgment of paternity in October 2006 when she was hospitalized for

[2] Respondents' motion to supplement the record with recent pleadings filed is denied.

overdosing on alcohol. Washington's Uniform Parentage Act (UPA)[3] permits the mother and a man to acknowledge paternity in a written document. RCW 26.26.300 provides:

> The mother of a child and a man claiming to be the father of the child conceived as the result of his sexual intercourse with the mother may sign an acknowledgment of paternity with intent to establish the man's paternity.

An acknowledgment of paternity takes effect when filed with the state registrar of vital statistics.[4] Here, the acknowledgment of paternity was not filed until July 10, 2007.

The act also provides for rescission of the acknowledgment:

> A signatory may rescind an acknowledgment or denial of paternity by commencing a court proceeding to rescind before the earlier of:
> (1) Sixty days after the effective date of the acknowledgment or denial, as provided in RCW 26.26.315; or
> (2) The date of the first hearing in a proceeding to which the signatory is a party before a court to adjudicate an issue relating to the child, including a proceeding that establishes support.[5]

Tina rescinded the acknowledgment of paternity on June 29, 2007, when she submitted her dying declaration denying Walker as the father and requesting that CRW be placed with her brother and sister-in-law. Moreover, the acknowledgment would not have taken effect until it was registered on July 10, 2007, after Tina had already rescinded the document.

Walker argues that the rescission is ineffective because the mother did not use the mandatory forms. RCW 26.26.065 provides that "a party shall not

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[3] Chapter 26.26 RCW.
[4] RCW 26.26.315(3).
[5] RCW 26.26.330.

file any pleading . . . unless on forms approved by the administrative office of the courts." RCW 26.18.220(3), however, provides:

> A party's failure to use the mandatory forms or follow the format rules shall not be a reason to dismiss a case, refuse a filing, or strike a pleading. However, the court may require the party to submit a corrected pleading and may impose terms payable to the opposing party or payable to the court, or both.

To hold otherwise would elevate form over substance.[6] This is particularly true here, where Tina's affidavit included the relevant information contained in the "form" rescission.

Walker also asserts that Tina was incompetent to rescind the acknowledgment. This is refuted by Tina's attorney, David Yamashita, who filed a declaration that the mother was competent at the time she executed the affidavit. Walker also argues that the court erred in not viewing a video which allegedly demonstrated Tina's incompetence. The admission and exclusion of relevant evidence is within the sound discretion of the trial court, and the court's decision will not be reversed absent a manifest abuse of discretion.[7] The video in question was taken by Walker on his cell phone and not at the time that the documents in question were executed. Thus, its relevancy is questionable and the trial court did not err in refusing to admit it.

Additionally, there was other evidence that Tina did not hold Walker out

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[6] See In re Marriage of Daubert and Johnson, 124 Wn. App. 483, 490-91, 99 P.3d 401 (2004), (failure to use mandatory form for findings of fact did not warrant reversal where findings of fact were made, albeit not on the provided form), rev'd on other grounds, McCausland v. McCausland, 159 Wn.2d 607, 152 P.3d 1013 (2007).

[7] Wallace Real Estate Inv., Inc. v. Groves, 72 Wn. App. 759, 771, 868 P.2d 149 (1994).

as the father of CRW. A Department of Social and Health Services investigation of the mother and Walker's potential financial responsibility for support payments occurred in September 2003. Tina informed the investigator that Walker was not the father and not responsible, that CRW was the product of an unreported rape, and that she would submit to a paternity test if needed to prove Walker was not the father. Walker's reliance on a statement in the investigator's report that the mother "agreed that people could get the wrong impression" about whether Walker was the father is misplaced. The investigator concluded that Tina's "situation [as represented to the investigator] appears accurate."

Neither is the doctrine of equitable estoppel applicable here. Walker argues that Tina held Walker out to be CRW's father, that she told Walker he was the father, and that she gave the child his last name. These claims are all disputed by Tina's own affidavit.

Genetic Testing

Walker argues that the trial court failed to consider the best interests of CRW when it ordered Walker to submit to DNA testing to determine paternity. However, once having determined that the rescission was valid, the court was required to order genetic testing to determine whether the acknowledgment should be upheld or set aside. RCW 26.26.375(3) provides in pertinent part:

> Should the respondent or any other person appearing in the action deny the allegations, a permanent parenting plan or residential schedule may not be entered for the child without the matter being converted to a proceeding to challenge the acknowledgment of paternity under RCW 26.26.335 and 26.26.340. A copy of the acknowledgment of paternity must be filed with the petition or response. The court may convert the matter to a proceeding to

challenge the acknowledgment on its own motion.

RCW 26.26.405 authorizes the court to order genetic testing:

> (1) Except as otherwise provided in this section and RCW 26.26.410 through 26.26.630, the court shall order the child and other designated individuals to submit to genetic testing if the request for testing is supported by the sworn statement of a party to the proceeding:
>
> (a) Alleging paternity and stating facts establishing a reasonable probability of the requisite sexual contact between the individuals; or
>
> (b) Denying paternity and stating facts establishing a possibility that sexual contact between the individuals, if any, did not result in the conception of the child.

Walker's reliance on RCW 26.26.535 to preclude genetic testing is not well taken. That statute, which simply codifies case law previously developed, gives the court authority to deny genetic testing of a "presumed father."[8] It is only the presumed father who can protest genetic testing. Walker is simply not a presumed father. Nor, as seen previously, is he an acknowledged father.

Walker argues vehemently that it could not be in CRW's best interest to find that he was *fillius nullus*. But had the testing revealed Walker as the biological father, the dispute would have ended there. Further, the court did not automatically order genetic testing but rather appointed a GAL to represent CRW's interests. At a hearing, the court heard from a lengthy report of the GAL, Eileen Butler, as well as the parties' attorneys. Multiple declarations were submitted to the court. Walker, himself, represented to the court that he was the

[8] Washington Family Law Deskbook (Wash. St. Bar Assoc. 2ded 2000 & Supp 2006). § 58.7(2); see McDaniels v. Carlson, 108 Wn.2d 299, 738 P.2d 254 (1987); In re Marriage of T., 68 Wn. App. 329, 842 P.2d 1010 (1993); In re Marriage of Thier, 67 Wn. App. 940, 841 P.2d 794 (1992); In re Marriage of Wendy M, 92 Wn. App. 430, 962 P.2d 130 (1998).

actual father. From the number of vituperative affidavits submitted, it was clear that this was going to be a vehemently contested action. The trial court was well within its authority to rely on the recommendation of the GAL in ordering the paternity test.

Clearly, the earliest decision resulting in permanent placement was in CRW's interest. Here, the mother specifically directed that CRW be placed with her brother and his wife. Although CRW is *fillius nullus*, he is not without relatives.

De Facto Parent

Walker argues that once it was determined that he was not the biological father, the trial court erred in removing CRW from his custody without first holding an evidentiary hearing so that Walker could establish de facto parentage.

In In re Parentage of L.B.,[9] our Supreme Court held that the de facto parent doctrine applies to claims asserted under Washington's UPA. L.B. set forth a four-part test:

> "(1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the petitioner and the child lived together in the same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature."[10]

Additionally, as noted in L.B., recognition of a de facto parent is "'limited'" to an

[9] 155 Wn.2d 679, 122 P.3d 161 (2005).
[10] L.B., 155 Wn.2d at 708 (quoting In re Parentage of L.B., 121 Wn. App. 460, 487, 89 P.3d 271 (2004).

adult who has "'fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life.'"[11] Such de facto status is not a matter of right, but rather it is a matter of what is to be determined in the best interests of the child who is at the center of this dispute.

The factual scenario presented in L.B. is far different than the one presented here. L.B. involved two women in an intimate relationship who had a child by artificial insemination.[12] After the birth of the child, the women lived together as a family unit with both sharing parental duties. One partner was called "mama" and the other "mommy." When the child was six years old, the parties separated, and the biological mother unilaterally terminated the relationship between her former partner and the child. The court remanded to the district court for a determination of whether the partner qualified for a de facto parent.

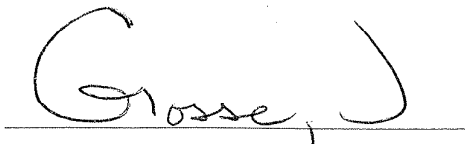
Here, however, the facts do not pass the threshold test set forth in L.B. Walker never lived with the mother and CRW as a family unit for any significant length of time. Walker urges this court to disregard that factor, or at the very least, not to accord it equal weight with the other factors. Because the de facto parent stands in legal parity with an otherwise legal parent, whether biological, adoptive or other, it is imperative that this status be available only when all four factors set forth in L.B. are met. Not only does Walker clearly not meet the factor of living together as a family, it is questionable whether he meets the first

[11] L.B., 155 Wn.2d at 708 (quoting C.E.W. v. D.E.W., 2004 M.E. 43, 845 A.2d 1146, 1152).
[12] L.B., 155 Wn.2d at 683-84.

factor—the mother consenting to or fostering the parent-like relationship. Babysitting for a child does not elevate one to a parent. Indeed, the majority of the affidavits submitted on Walker's behalf spoke of his relationship with CRW after he had removed the child from the relatives' care. His status during that time frame cannot establish the relationship.[13]

A full evidentiary hearing is not needed where the petitioner is unable to meet the threshold criteria set forth in L.B. An adequate cause determination for third party custody can be based on opposing affidavits.[14] The trial court stands in the best position to determine whether submitted affidavits establish adequate cause for a full hearing. In re Parentage of Jannot[15] held that where a trial court determined, based on affidavits alone, that adequate cause did not exist to justify a full hearing on a petition to modify a parenting plan, the appellate standard of review was abuse of discretion. The trial court's determination here is substantially supported by the submitted affidavits.

Affirmed.



WE CONCUR:

[13] See Marriage of Taddeo-Smith and Smith, 127 Wn. App. 400, 405, 110 P.3d 1192 (2005) (rejecting a father's claim of integration when mother temporarily allowed children to reside with father following a car accident and father subsequently refused to return the children); George v. Helliar, 62 Wn. App. 378, 380, 384-85, 814 P.2d 238 (1991) (rejecting father's claim of "integration" when he unilaterally removed child from mother's care and prevented mother from regaining custody of the child).
[14] 149 Wn.2d 123, 126, 65 P.3d 664 (2003).
[15] Jannot, 149 Wn.2d at 125.

Dwyer, A.C.J. Edlington, J.